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No. 74-18

In the Supreme Court of the United States

OCTOBER TERM, 1974

SOLOMON FISHER, MORRIS GOLDSMITH AND SALLY GOLDSMITH, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question raised by the petition is whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusal to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

1. The facts are not in dispute. In July 1971, Alan M. Feldman, a special agent of the Intelligence Division of the Internal Revenue Service, spoke with petitioner Morris Goldsmith and made an appointment with him to discuss his tax liability. On August 3, 1971, Goldsmith and his wife retained petitioner Solomon Fisher, an attorney, to represent them, and Fisher called Feldman and advised him that his client Goldsmith would not appear for the appointment. On or about August 5, 1971, the Goldsmiths obtained from their accountant certain records compiled by the accountant in connection with his preparation of their tax returns. These records, some of which dated as far back as 1959, were essentially lists of income and expenses compiled by the accountant from cancelled checks and deposit receipts supplied by the Goldsmiths. On August 17, 1971, the Goldsmiths turned these records over to Fisher (Pet. App. B, A10-A11).

Subsequently, Special Agent Feldman served an internal revenue summons upon the accountant seeking production of the records relating to the Goldsmiths' income and disbursements. The accountant appeared and reported that he did not have the documents in question. Thereafter, the agent served a summons upon petitioner Fisher, directing production of the records prepared by the accountant which had been transmitted to him by the Goldsmiths. Upon his refusal to permit inspection of the records, this enforcement action was commenced in the United States District Court for the Eastern District of Pennsylvania (Pet. App. B, A11-A12).

After a hearing, the district court ordered enforcement of the summons. The court further found that the records sought were owned by the accountant and rejected petitioners' claimed Fifth Amendment privilege (Pet. App. A, A1-A7). In an *en banc* decision, with one judge concurring in part and dissenting in part, the court of appeals affirmed (Pet. App. B, A8-A44).

2. The decision below upholds the enforcement of an internal revenue summons requiring the production by an attorney of an accountant's workpapers which were turned over to the attorney by the clients after they obtained them from the accountant. The papers at issue related to the accountant's preparation of past tax returns of the client and were given to the attorney after the commencement of a tax investigation of the client. In these circumstances, the courts below correctly concluded that the clients' Fifth Amendment privilege could not be invoked as a bar to compelling the attorney to produce the summoned accountant's workpapers.[1]

In *Couch* v. *United States,* 409 U.S. 322, this Court reaffirmed that the Fifth Amendment privilege against self-incrimination is an intimate and personal right. While the privilege had been held to cover books and records in *Boyd* v. *United States* 116 U.S. 616, the Court has explicitly limited the scope of the claim in those circumstances to private papers. Thus, in *Couch* v. *United States, supra,* 409 U.S. at 330, n. 10, the Court observed that "[a] later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.' United States* v. *White,* 322 U.S. 694, 699 (1944). (Emphasis added.)" See also *Bellis* v. *United States,* No. 73-190, decided May 28, 1974, slip op. 5.

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[1]Because the claimants, Morris and Sally Goldsmith, intervened in this summons enforcement proceeding, the courts below did not have to address the question whether an attorney can raise a Fifth Amendment claim on behalf of his client. Compare *Bouschor* v. *United States,* 316 F. 2d 451 (C.A. 8), with *United States* v. *Judson,* 322 F. 2d 460 (C.A. 9). See also *United States* v. *Kasmir,* 499 F. 2d 444, 454-455 (C.A. 5), pending on the government's petition for a writ of certiorari, No. 74-611.

In *Couch* v. *United States, supra,* the Court held that where the owner of books and records transferred them to an accountant, she could not invoke the privilege as a bar to the compelled production of the records by the accountant. Since the claimant of the privilege in *Couch* did not have possession of the records in question, the Court concluded that "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329).

While *Couch* emphasized the absence of possession of the summoned documents by the claimant, the decision below correctly held that the taxpayers' brief possession of the papers was insufficient to establish the requisite constructive possession of them for purposes of the privilege against self-incrimination. As the court of appeals observed, the taxpayers' possession of the papers was "fleeting and transitory, limited to the act of delivery from the accountant's office to the office of their lawyer" (Pet. App. B, A24). Compare *United States* v. *White,* 477 F. 2d 757 (C.A. 5), affirmed *per curiam en banc,* 487 F. 2d 1335 (C.A. 5), certiorari denied, October 15, 1974, No. 73-1308. Here, the summoned workpapers were not the private papers of the taxpayers, for they originated with and belonged to their accountant. If anyone remained in constructive possession of the papers after their transfer to the attorney, it was the accountant (who could be required to authenticate and testify about them) rather than the taxpayers. Compelled production by the attorney of the accountant's papers in these circumstances does not constitute the "extortion of information from the accused himself that offends our sense of justice" (*Couch* v. *United States, supra,* 409 U.S. at 328). As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279-280, "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

3. Subsequent to the decision below, the Fifth Circuit rendered its opinion in *United States* v. *Kasmir,* 499 F. 2d 444, pending on the government's petition for a writ of certiorari, No. 74-611. There, on closely parallel facts, that court held, with one judge dissenting, that the Fifth Amendment privilege was available to bar production of an accountant's workpapers which, after the commencement of a tax investigation, were transferred to the taxpayer who turned them over to his attorney.[2] There is therefore a square conflict of decisions between two circuits on an issue which is of major importance to the conduct of federal tax investigations. Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]Petitioners set forth the *Kasmir* opinion at pages A1-A22 in the appendix to a supplemental brief in support of the petition. A copy of the government's petition for a writ of certiorari in *Kasmir* has been served on the respondents in this case. We have asked the Court to grant certiorari in *Kasmir* or alternatively, to hold the case pending the disposition in this case.

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